Supreme Court, U.S.
FILED
AUG 2 1993
OFFICE OF THE CLERK

93-206

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHURCH OF SCIENTOLOGY INTERNATIONAL,

Petitioner,

vs.

MITCHELL DANIELS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MORRISON COHEN SINGER & WEINSTEIN
Attorneys for Petitioner
750 Lexington Avenue
New York, New York 10022
(212) 735-8600

Of Counsel:
JONATHAN W. LUBELL*
ARLENE R. SMOLER
* *Counsel of Record*

QUESTIONS PRESENTED

1. Are the First Amendment concerns recognized by *New York Times v. Sullivan* and its progeny applicable to a false and defamatory publication made by a declarant who has purposely avoided the truth in his investigation of the subject of the publication?

2. Where a libel defendant has engaged in purposeful avoidance of the truth, does the reckless disregard prong of the actual malice test set forth in *New York Times v. Sullivan* and its progeny require direct proof that the libel defendant acted with a high degree of awareness of probable falsity, as held by the Fourth Circuit below, or may such awareness be inferred from the purposeful avoidance of the truth, as held by the Ninth Circuit in *Masson v. New Yorker Magazine, Inc.*?

3. Given that the actual malice test set forth in *New York Times v. Sullivan* is subjective in nature, may an examination of the actual malice issue properly be restricted to an analysis of the reasonableness of a libel defendant's interpretation of an event and exclude any examination of the libel defendant's knowledge of falsity and ill-will?

4. May evidence that is analyzed cumulatively support a finding of actual malice as defined in *New York Times v. Sullivan* and its progeny when no single piece of evidence taken in isolation is sufficient to support a finding of actual malice?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	1
CONSTITUTIONAL PROVISION	2
STATEMENT OF FACTS	2
1. Background	2
2. The Defamatory Statement and Meaning	4
3. Falsity and Actual Malice	4
4. The Decisions Below	8
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	15
Appendix A	
Decision of the United States Court of Appeals for the Fourth Circuit (May 4, 1993)	A-1
Appendix B	
Order of the United States District Court for the Eastern District of Virginia, Alexandria Division (May 29, 1992)	A-12
Appendix C	
Transcript of Interview of Mitchell Daniels as it appeared in the June 11, 1991 edition of *USA Today*	A-13

TABLE OF AUTHORITIES

Cases	Page
Bose Corp. v. Consumers Union of United States, Inc., 460 U.S. 485 (1984)	13
Garrison v. Louisiana, 379 U.S. 64 (1964)	10
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	11
Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 2049 (1970)	13
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)	10, 11
Herbert v. Lando, 441 U.S. 153 (1979)	13
Masson v. New Yorker Magazine, Inc., ___U.S.___, 111 S.Ct. 2419 (1991)	10
Masson v. New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992)	12
McKinley v. Baden, 777 F.2d 1017 (5th Cir. 1985)	13
Newton v. National Broadcasting Co. Inc., 930 F.2d 662 (9th Cir. 1990) *cert. denied*, ___U.S.___, 112 S.Ct. 192 (1991), *cert. denied*	13
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	*passim*
Perk v. Reader's Digest Association, Inc., 931 F.2d 408 (6th Cir. 1991)	13
St. Amant v. Thompson, 390 U.S. 727 (1968)	13
Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987)	13

Page

Statutes

28 U.S.C. §1254(1) 2

Legal Periodicals

Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487 (1991) 9

Bezanson & Murchison, *The Three Voices of Libel*, 47 Wash. & Lee. L. Rev. 213 (1990) ... 9

Epstein, *Was New York Times v. Sullivan Wrong?* 53 U. Chi. L. Rev. 782 (1986) 9

Franklin, *Good Names and Bad Law: A Critique of Libel Law and A Proposal*, 18 U.S.F. L. Rev. 1 (1983) 9

Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 Va. L. Rev. 785 (1979) 9

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHURCH OF SCIENTOLOGY INTERNATIONAL,

Petitioner,

vs.

MITCHELL DANIELS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Church of Scientology International ("CSI")[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on May 4, 1993.

[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that petitioner Church of Scientology International has no parent companies or subsidiaries.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 992 F.2d 1329, and is reprinted in the appendix annexed hereto. 1a.[2] The order of the United States District Court of the Eastern District of Virginia, Alexandria Division is unreported and is set forth in the appendix. 12a.

JURISDICTION

On May 4, 1993, the United States Court of Appeals for the Fourth Circuit affirmed the order of the United States District Court of the Eastern District of Virginia, Alexandria Division, granting respondent's motion for summary judgment and dismissing petitioner's defamation complaint in its entirety. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

STATEMENT OF FACTS

1. *Background*

Petitioner CSI, a non-profit corporation that is the Mother Church of the Scientology religion, has been instrumental in publicizing the harmful side effects of many psychiatric drugs, including Prozac, a drug that may induce violent behavior, suicide ideation and other dangerous responses. JA604 and JA658.

---

[2] References to "____a" are to the appendix to this petition. References to "JA____" are to the Joint Appendix filed in the Court below.

Prozac is the nation's best-selling anti-depressant. It has been prescribed for more than 3.5 million people world-wide. After entering the marketplace in 1988, sales had approached $775 million in 1990 and were expected to exceed $1 billion in 1991. JA327 and JA659.

It is widely acknowledged that CSI's efforts have had a negative impact upon the sales of Prozac. For example, on April 19, 1991 the *Wall Street Journal* published a front page article by Thomas A. Burton entitled "Medical Flap: Anti-Depressant Drug of Eli Lilly Loses Sales After Attack by Sect."

Prozac is manufactured and marketed by Eli Lilly & Co. In April of 1991, in direct response to CSI's success in alerting the public to Prozac's potential dangers, Lilly management formulated a plan to, in its own words, "expose and discredit the Church of Scientology." JA973. Respondent Mitchell Daniels, who is Lilly's Vice President in Charge of Corporate Affairs, participated in drafting the plan. JA959 to 960.

As part of Lilly's strategy to discredit CSI, Daniels requested a meeting with the Editorial Board of *USA Today*. This meeting, which took place on June 10, 1991, was attended by Daniels, a number of the newspaper's editors and reporters, and four members of the psychiatric community who had been invited to attend by Daniels. JA82 to JA85. *USA Today* published excerpts from that meeting in question and answer form on the "Inquiry" page of its June 11, 1991 edition. The newspaper's prefatory remarks described the meeting as follows:

> Prozac, a commonly prescribed antidepression drug made by Eli Lilly & Co. has been under attack from the Church of Scientology and lawyers who have developed the so-called "Prozac defense" — blaming the drug for their clients' behavior. They and some former users charge that the drug causes bizarre mental side effects and can lead to suicide.
>
> Mitchell Daniels, Eli Lilly's vice-president for corporate affairs, defended the drug and attacked the

> attackers Monday in a meeting with USA Today's editorial board. 13a.

2. *The Defamatory Statement and Meaning*

During Daniels' meeting, in which, in the words of *USA Today*, he "attacked the attackers," respondent was quoted as follows:

> One thing we want you to understand is that the Church of Scientology is no Church. It's a commercial enterprise. Every judge and every investigative reporter who has ever looked at it has come away with that conclusion. 13a.

This is the false and defamatory statement that gave rise to CSI's particular defamation claim herein.

In its complaint, petitioner confined the scope of its lawsuit to a claim based on Daniels' charge that every court ruling regarding the religious status of the Church of Scientology has concluded it is not a Church. Petitioner chose not to sue upon the other allegations in the paragraph. Accordingly, petitioner's lawsuit is based upon the claim that one of the reasonable interpretations to which the published statement is susceptible is that:

> every judge who has ever looked at it has come away with the conclusion that the Church of Scientology is no church. JA595.

3. *Falsity and Actual Malice*

Respondent Daniels is a graduate of Georgetown University Law School, a lawyer and a former practicing attorney with the Indianapolis law firm of Baker and Daniels. JA575 to JA576. *Prior* to attending the June 10, 1991 meeting at *USA Today*'s Virginia offices, Daniels had asked his staff to provide him with copies of cases concerning the Church and Scientology and he had read at least two decisions involving CSI's predecessor as Mother Church, the Church of Scientology of California:

(a) the Ninth Circuit's opinion in *Church of Scientology of California v. Commissioner of Internal Revenue*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), and (b) the Tax Court decision which had been appealed to the Ninth Circuit, *Church of Scientology of California v. Commissioner of Internal Revenue*, 83 T.C. 381 (1984), *aff'd*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). JA566. The Ninth Circuit decision contains the following language regarding the Church as a religious institution:

> The Church propagated the Scientology faith, a religion founded by L. Ron Hubbard, through such means as the indoctrination of laity, training and ordination of ministers, creation of congregations, and provision of support to affiliated organizations.
>
> * * *
>
> Scientology is an international religion with numerous churches around the world.
>
> * * *
>
> Neither the Commissioner, nor the Tax Court, nor this Court questions that the Church of Scientology of California was organized for a bona fide religious purpose. The only question before the Court, is whether the Church met the second requirement for tax exempt status, the operational test.

823 F.2d at 1313, 1315.[3]

---

[3] The Court of Appeals concluded that the Church of Scientology of California had failed to establish for the years 1970-1972 that "no part of the net earnings inures to the benefit of any private shareholder or individual. 26 U.S.C. §501(c)(3)." 823 F.2d at 1315. The effect was that for the years in question, the Church of Scientology of California was denied tax exempt status. The Ninth Circuit decision clearly demonstrates that a denial of tax exempt status does not establish that a particular organization is not religious in nature. Indeed, at his deposition, Daniels specifically testified to his understanding (a) that the fact that an organization does not qualify for tax exempt status does not mean it is not a religion, and (b) that some of the Churches of Scientology still retain their tax exemption. JA571 to JA573.

The Tax Court decision, which was affirmed by the Ninth Circuit only on the inurement issue, described "the Religion" stating that "Scientology teaches that the individual is a spiritual being having a mind and a body," that "Scientology teaches that spiritual awareness is achieved in stages," that "Scientology is an international religion" and that its ministers "officiated at weekly Sunday services and performed services such as marriages, baptisms, and funerals." 83 T.C. at 385-386.

In addition to the two tax opinions cited above, numerous other decisions discussing the religiosity of Scientology and its Churches had been rendered prior to Daniels' publication of the challenged statement which gave rise to this lawsuit. For example, some four months prior to Daniels' statement, the federal district court for the Middle District of Florida had considered the religiosity of Scientology and found that "Scientology fulfills the elements of the modern definition of religion." *Church of Scientology Flag Services Org., Inc. v. City of Clearwater*, 756 F. Supp. 1498, 1511 (M.D. Fla. 1991). Describing the Mother Church, the Court, reproducing language used by the United States Supreme Court in its widely publicized decision, *Hernandez v. Commissioner of Internal Revenue Service*, 490 U.S. 680, 684 (1989), stated:

> Scientology is propagated by a mother church in California and by numerous branch churches around the world. The mother church instructs laity, trains and ordains ministers, and creates new congregations. Branches, known as franchises or missions, provide Scientology services at the local level.

756 F. Supp. at 1510.

Numerous other federal and state courts have found Scientology to be a *bona fide* religion and its Churches to be legitimate religious institutions. For example:

> The supporting documents for the proposition that Scientology is a religion do more than make a prima

facie case; they make a strong case. *Wollersheim v. Church of Scientology of California*, No. C332027, (Superior Court of Cal., L.A. County, June 14, 1985)(JA680);

I have indicated there is plenty of case authority indicating certainly that *prima facie* the Church of Scientology of California is a religious institution. *Church of Scientology of California v. Armstrong*, No. C420153 (Superior Court of Cal., L.A. County, April 20, 1984)(JA711);

As far as I am concerned, Scientology is a religion. I don't think there should be any serious doubt about that. *Church of Scientology of Boston v. Flynn*, No. 81-1194 (Mass. Sup. Ct., Middlesex Co., May 11, 1984) (JA683);

We have found that it is established in this case that the Mission is a religious organization and that Scientology is a religion. *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 644 P.2d 577, 603 (1982), *cert. denied*, 459 U.S. 1206 (1983)(JA742);

As was found in regards to another religious institution (the Gospel Spreading Church) this Court believes the Church of Scientology to be "[a]n established church with substantial congregations . . . [which] seeks to play an influential role in ordering society.'" *Church of Scientology of California v. Siegelman*, 475 F. Supp. 950, 954 (S.D.N.Y. 1979)(JA752); [and]

Finally, with respect to their claim to be a religion and hence within the protection of the First Amendment, they have shown that the Founding Church of Scientology is incorporated as a church in the District of Columbia, and that its ministers are qualified to perform marriages and burials. They have introduced

> their Creed into evidence. The Government has made no claim that the Founding Church is not a *bona fide* religion, that auditing is not part of the exercise of that religion, or that the theory of auditing is not a doctrine of that religion. *The Founding Church of Scientology of Washington, D.C. v. United States*, 409 F.2d 1146, 1154 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969)(JA765).[4]

4. *The Decisions Below*

Petitioner commenced this action by filing a complaint on February 6, 1992 in the District Court. Daniels moved for summary judgment on three separate grounds. After hearing oral argument, the District Court granted Daniels' motion from the bench on the grounds (a) that the plaintiff had failed to present sufficient evidence of actual malice and (b) that the challenged statement is not defamatory as a matter of law, but rejected Daniels' claim that the challenged statement is not "of and concerning" CSI. JA42 to JA43. No opinion has been issued by the District Court.

The Court of Appeals affirmed the District Court's ruling on the actual malice issue (10a) without ruling on Daniels' defamatory meaning and "of and concerning" arguments. The

---

[4] In addition, judges throughout the world have reached similar findings. In 1983 the High Court of Australia held that:

> [T]he applicant has easily discharged the onus of showing that it is religious. The conclusion that it is a religious institution entitled to the tax exemption is irresistible. *The Church of the New Faith v. The Commissioner for Payroll Tax*, Order of October 27, 1983, (High Court of Australia). (JA802).

Similarly, in 1985 the District Court of Stuttgart, found that:

> According to its own understanding this Church [of Scientology] is a salvation religion which deals with the human soul and the riddles of life and which sees its roots and historical tradition in Buddhism, Hinduism and other religions. *People v. Munz*, Dist. Ct., Stuttgart (Jan. 30, 1985). (JA839).

All these decisions are included in the Joint Appendix at pages JA665 to JA841.

Court of Appeals held that in order to establish the reckless disregard branch of the actual malice test, a libel plaintiff must present direct proof that a defendant acted with a high degree of awareness of probable falsity. Under the Fourth Circuit's analysis, reckless disregard may not be inferred from purposeful avoidance of the truth; reckless disregard requires additional, independent proof of falsity. 9a.

In reviewing CSI's evidence of actual malice, the Court of Appeals analyzed each single piece of evidence separately and concluded that conflicting interpretations of court rulings regarding the Scientology religion were reasonable. 9a to 10a. The Court failed to engage in a subjective analysis of the circumstances surrounding the publication of the challenged statement, an approach that permitted it to conclude that evidence of Daniels' ill will or hostility does not "help [CSI's] claim." 10a.

REASONS FOR GRANTING THE PETITION

I.

Our laudable collective desire to promote the free exchange of ideas, as expressed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny, has inevitably limited the ability of victims of defamation to vindicate their reputation by resorting to litigation. As numerous commentators have noted, most public figure libel plaintiffs simply cannot meet the burden imposed by the actual malice standard. *See e.g.*, Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487 (1991) and Franklin, *Good Names and Bad Law: A Critique of Libel Law and A Proposal*, 18 U.S.F. L. Rev. 1 (1983).[5]

As society has struggled to balance its interest in the preservation of informed public debate with its concern for the

---

[5] *See also*, Bezanson & Murchison, *The Three Voices of Libel*, 47 Wash. & Lee. L. Rev. 213 (1990); Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782 (1986) and Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 Va. L. Rev. 785 (1979).

preservation of individual reputation,[6] this Court has recognized that purposeful avoidance of the truth furthers neither goal. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

Less than a year after *Sullivan*, in a decision by Justice Brennan, the author of the *Sullivan* opinion, this Court, in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), unambiguously roclaimed that the calculated falsehood, the knowingly false statement, is not entitled to constitutional protection:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.
>
> * * *
>
> For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L.ed 1031, 1035, 62 S.Ct. 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

---

[6] As noted in this Court's 1991 *Masson* decision, the protection of reputation through a defamation tort action dates back to the latter half of the 16th Century. *Masson v. New Yorker Magazine, Inc.*, ____ U.S. ____, 111 S.Ct. 2419, 2432 (1991).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), this Court again emphasized that

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S., at 270, 11 L.Ed.2d 686, 95 ALR 2d 1412.

Similarly, statements made with purposeful avoidance of the truth do not come within the First Amendment protection of *Sullivan* and its progeny.

In *Harte-Hanks Communications, Inc. v. Connaughton*, this Court held that

> [a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.

491 U.S. at 692 (citation omitted).

Petitioner urges this Court to make clear that a finding of purposeful avoidance of the truth itself will satisfy the actual malice requirement of *Sullivan*.

Moreover, and, we respectfully submit, equally significant, the Courts below and the bar need guidance from this Court as to the necessary elements for establishing the purposeful avoidance of the truth. The current conflict on this issue is well illustrated in comparing the decision below with a 1992 decision of the Ninth Circuit. In affirming the District Court's order granting summary judgment and dismissing petitioner's complaint in its entirety, the Fourth Circuit herein interpreted *Harte-Hanks* to mean that in order to establish reckless disregard plaintiff must have *direct* proof that the defendant acted with "a high degree of awareness of probable falsity." 9a. Thus, in essence, the Fourth Circuit has held that a finding of purposeful avoidance of the truth does not satisfy the actual malice requirement without other, independent proof of a high degree of awareness of probable falsity.

In contrast, in *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896 (9th Cir. 1992), the Ninth Circuit held that a libel plaintiff may establish clear and convincing evidence that the publisher of a defamatory statement acted with reckless disregard in either of two ways:

> First, he can establish the publisher's state of mind by evidence that the publisher "actually had a high degree of awareness of probable falsity." Second, plaintiff may show that the circumstances surrounding publication gave the publisher "obvious reasons to doubt the veracity of the [author] or the accuracy of [facts and quotations in her book or article]," and that the publisher failed to take reasonable steps to dispel those doubts.
>
> As we interpret *Harte-Hanks*, these two standards provide different paths to the same conclusion. Where the jury has proof that a publisher "actually had a high degree of awareness of probable falsity," that alone will establish that it "in fact entertained serious doubts as to the truth of [its] publication." Where such direct proof is missing, the jury may nevertheless infer that the publisher was aware of the falsity if it finds that there were "obvious reasons to doubt" the accuracy of the story, and that the defendant did not act reasonably in dispelling those doubts.

960 F.2d at 900. In support of its analysis, the Ninth Circuit cited this Court's statement that "the purposeful avoidance of the truth is in a different category."

Petitioner respectfully submits that the following issues, raised by the decision below, require this Court's consideration in order to settle conflicting treatment of actual malice proof in regard to the purposeful avoidance of the truth:

> Are obvious reasons to doubt the accuracy of the statement to be published established where the jury could reasonably find that the declarant had information

that directly challenged the accuracy of the intended statement?

Where the declarant knows of accessible sources with information concerning the intended statement and fails to seek them out, is there "purposeful avoidance?"

Can proof of the purposeful avoidance of the truth establish a high degree of awareness of probable falsity?

The answering of these questions will result in a predictable body of law sensitive to both First Amendment and reputational issues.

II.

The decision below represents a departure from the subjective examination required by this Court in connection with the actual malice issue. The error below should be corrected so as to ensure that the actual malice test will not now be interpreted as requiring a plaintiff to meet both an objective and then a subjective standard.

The Fourth Circuit found that interpretation of the Court decisions read by respondent were reasonably susceptible to conflicting meanings: that the predecessor Scientology Mother Church was a church and that it was not. 7a. This objective test lead the Court to find no deliberate misrepresentation or knowing fabrication. (*Id.*) But, an objective determination is not the equivalent of the subjective finding required by *Sullivan*. In fact, it may well be directly contrary to a subjective finding where the evidence shows the declarant's particular knowledge, experience, motive and purpose for making the statement.

In the past, the subjective requirement has been used to defeat a finding of actual malice even when objectively falsity should have been known. *Newton v. National Broadcasting Co. Inc.*, 930 F.2d 662, 681 (9th Cir. 1990), *cert. denied*, ____U.S.____, 112 S.Ct. 192 (1991) and *McKinley v. Baden*, 777 F.2d 1017, 1021 (5th Cir. 1985). Here, it should be made clear that a plaintiff

need not meet the objective standard where there is evidence sufficient to establish the declarant's subjective knowledge that his statement was false.

III.

A libel plaintiff may prove the defendant's subjective state of mind through the *cumulation* of circumstantial evidence, as well as through direct evidence. *Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Perk v. Reader's Digest Association, Inc.*, 931 F.2d 408, 411 (6th Cir. 1991); and *Tavoulareas v. Piro*, 817 F.2d 762, 789 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987). Indeed, a cumulative analysis is necessary in order to properly evaluate whether the declarant subjectively believed in the truth of his statements. *See, St. Amant v. Thompson*, 390 U.S. 727, 731-732 (1968) and *Bose Corp. v. Consumers Union of United States, Inc.*, 460 U.S. 485, 511 n. 30 (1984).

The Fourth Circuit, ignoring the permissible use of cumulative and circumstantial evidence, rejected evidence which it did not find capable, by itself, of establishing actual malice. 10a. Petitioner submits that this Court should reexamine the use of cumulative and circumstantial evidence to establish actual malice so that plaintiffs, within the confines of the *Sullivan* principles, are given a fair chance to muster the necessary proof. *See e.g.: Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 2049 (1970).

The need through judicial rulings to wisely and realistically regulate the tensions between the interest in free speech and the concern for individual reputation requires this Court to make clear the use of cumulative and circumstantial evidence by defamation plaintiffs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN W. LUBELL
ARLENE R. SMOLER
MORRISON COHEN SINGER
& WEINSTEIN
Attorneys for Petitioner
750 Lexington Avenue
New York, New York 10022
(212) 735-8600

By: _____
JONATHAN W. LUBELL
Counsel of Record

Church of Scientology International v. Daniels

Appendix 1

Decision of the United States Court of Appeals for the Fourth Circuit (May 4, 1993) 992 F.2d 1329

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CHURCH OF SCIENTOLOGY INTERNATIONAL,
Plaintiff-Appellant,

v.

MITCHELL DANIELS,
Defendant-Appellee.

No. 92-1752

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-92-160-A)

Argued: March 2, 1993

Decided: May 4, 1993

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and RESTANI, Judge, United States Court of International Trade, sitting by designation.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Chief Judge Ervin and Judge Restani joined.

COUNSEL

ARGUED: Jonathan W. Lubell, MORRISON, COHEN, SINGER & WEINSTEIN, New York, New York, for Appellant. David Alan Rudlin, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee. **ON BRIEF:** Arlene R. Smoler, MORRISON, COHEN, SINGER &

WEINSTEIN, New York, New York; Michael L. Hertzberg, New York, New York, for Appellant. Thomas G. Slater, Jr., R. Hewitt Pate, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee.

OPINION

MURNAGHAN, Circuit Judge:

In June of 1991, the Church of Scientology International (CSI) ran a series of full page advertisements in USA Today Newspaper. Several of the ads spoke out against the use of drugs for the treatment of mental illness and depression, and targeted in particular the drug Prozac and its manufacturer Eli Lilly & Company. "Eli Lilly: Purveyor of dangerous drugs," read one caption. "What U.S. Drug Company Produced a Drug Named After Adolf Hitler?" asked another. "How much more human misery will occur before Eli Lilly & Company is held accountable for the effects of its dangerous drugs?" queried a third.

Shortly thereafter, CSI and Mitchell Daniels, Vice President of Eli Lilly, wound up in court. Not surprisingly, the issue presented to the court involved the tension between the right of an individual or corporation to protect its reputation and the conflicting right to free speech under the First Amendment. The allegedly defamatory statement at issue, however, was one made not by Church of Scientology International, but by Mitchell Daniels.

Daniels of Eli Lilly had responded to the USA Today advertisements run by CSI attacking the company by requesting an audience with the editorial board at USA Today. The following day the paper quoted him as saying:

> The source of virtually everything you've heard about Prozac has come from the Scientologists, with a boost from trial lawyers whose self-interest is obvious. One thing we want you to understand is that the Church of Scientology is no church. It's a commercial enterprise. Every judge and every investigative journalist who has ever looked at it has

> come away with that conclusion. It is organized for only one purpose, which is to make money.

CSI brought suit against Daniels in the United States District Court for the Eastern District of Virginia, demanding $50,000 in compensatory damages and $20 million in punitive damages. It claimed that Daniels' quoted statement could be construed as meaning that "every judge" who had ever considered the question had concluded that the Church of Scientology International was "no church," and that such a statement was false and defamatory. Defendant Daniels moved for summary judgment. After hearing oral argument, the district court granted Daniels' motion from the bench on the grounds that the challenged statement was not defamatory as a matter of law and that plaintiff had failed to present evidence upon which a reasonable jury could find actual malice by clear and convincing evidence. CSI has appealed.

I.

Appellant CSI contends on appeal that summary judgment was error because a jury could find that the challenged statement prejudiced CSI in the conduct of its religious affairs and thus was defamatory *per se*. Defendant-appellee Daniels advances three reasons why CSI's claim of defamation *per se* is unsupported. First, Daniels contends that his statement was not "of and concerning" the plaintiff. CSI is but one member of a loosely related group of entities that espouse Scientology. The statement, Daniels contends, pertained to the Church of Scientology as a movement and did not target CSI. *See Gazette, Inc. v. Harris*, 229 Va. 1, 37, 325 S.E.2d 713, 738 (1985) (plaintiff must show that the defamatory statement was intended to refer to him and would be so understood by persons reading it who knew him); *Ewell v. Boutwell*, 138 Va. 402, 409, 121 S.E. 912, 915 (1924) (defamatory statement about a large group cannot support a libel action by a member of the group).*

*The district judge did not base his ruling on a difference between the exact corporate names of the person bringing suit and the one named in the statement.

Second, Daniels argues that the statement is not defamatory as a matter of law. The defamatory meaning sued upon by CSI — "every judge has concluded that the Church of Scientology is no church" — is constructed only by leaving out significant portions of the actual quoted statement, he contends. Daniels takes the position that even if the plaintiff's version of the statement is accepted, the statement does not contain, as it must, an "imputation that is 'necessarily hurtful' in its effect upon plaintiff's business and [] affect[s] him in his particular trade or occupation." *Fleming v. Moore*, 221 Va. 884, 889-90, 275 S.E.2d 632, 636 (1981) (citations omitted). Daniels points out that under CSI's religious practices, parishioners are required to purchase all services according to a fixed price schedule. Any damages to the reputation of the entity, he contends, would necessarily show up in CSI's financial statements. But CSI has conceded that it has suffered no actual damages. Accordingly, Daniels maintains, the statement could not have been "necessarily hurtful" to the plaintiff's trade or business.

Finally, Daniels argues that CSI has not presented evidence upon which a jury could find actual malice. CSI has admitted that it is a public figure, and as such, it must prove that the defendant published the defamatory statement with actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (constitutional guarantees require that a public official, in order to recover in defamation, must prove that the statement was a falsehood made with actual malice); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (public figures as well as public officials must prove actual malice to recover for defamation). Daniels contends that he based his statement on a substantial volume of reputable information, and that CSI's allegations of fabrication, purposeful avoidance of the truth, and hostility do not constitute evidence of actual malice (knowing falsity or reckless disregard of the truth) as defined and applied by the Supreme Court.

Because the issue of actual malice is dispositive of the case, we need not decide the questions of whether or not the alleged statement was of and concerning CSI and whether or not it contained an imputation necessarily hurtful to the business of CSI. For purposes of the discussion of actual malice, we will assume that a jury could find a defamatory meaning in Daniels' statement, and that a jury could find that the statement was of and concerning CSI. However, we need not

and do not so hold. A decision on the issue of defamation as a matter of law would require an extended discussion of whether a reader would construe Daniels' statement as referring to CSI rather than to the entire Scientology movement; whether CSI could derive the defamatory meaning sued upon from an edited version of the actual statement; whether the statement constituted protected opinion, rhetorical hyperbole, or fact capable of being proved true or false; whether an organization such as CSI may claim defamation *per se* and therefore allege no actual damages; and whether the statement was necessarily hurtful to CSI's religious business. Such a discussion would be superfluous to our resolution of CSI's claims.

II.

In order to defeat a motion for summary judgment, a public figure libel plaintiff must present evidence to raise a jury question over whether a defendant published a false and defamatory statement with actual malice. While a plaintiff must meet a "clear and convincing" standard of proof of actual malice, the court must draw all possible inferences in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). Defendant Daniels must demonstrate the absence of genuine issues, but with regard to actual malice, an issue on which the plaintiff bears the burden of proof, he may obtain summary judgment if CSI fails to produce evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Actual malice is defined as either knowledge of falsity or reckless disregard for the truth or falsity of the statement. *New York Times v. Sullivan*, 376 U.S. at 280. CSI's allegation that Daniels knew of the falsity of his statement derives from Daniels' deposition testimony that he had read two published court opinions before making his comment. CSI claims that neither opinion supports Daniels' statement and that they in fact directly refute it. The cases, CSI claims, both recognize CSI as a religious institution. Thus when Daniels said that "every judge" had found the Church of Scientology to be "no church," he was deliberately falsifying and concocting wholly untrue accusations. *See Curtis Publishing Co.*, 388 U.S. at 153 (deliberate falsification constitutes actual malice); *Hudnall v. Sellner*, 800 F.2d 377, 382 (4th Cir. 1986) (evidence supported finding of actual malice where the legitimate inference drawn from testimony was that defendant "know-

ingly concocted the accusations out of whole cloth"), *cert. denied*, 479 U.S. 1069 (1987). *See also Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (when acknowledged source of a defamatory statement does not contain the information supposedly derived from it, reckless fabrication can be inferred).

CSI's charge that Daniels had knowledge of the falsity of his statement because he had read two court opinions does not stand up under scrutiny of those opinions. The opinions are susceptible to more than one interpretation as to whether they concluded that the Church of Scientology was a "church" — within the meaning of Daniels' statement — or indeed whether they addressed that question at all. In each case, the issue before the court was whether the Church of Scientology of California conformed to the requirements for tax exempt status under I.R.S. Code § 501. In both cases the courts noted that they accepted the Church's contention that it was organized as a religious institution. *See Church of Scientology v. Commissioner*, 83 T.C. 381, 385 (1984) ("the parties have stipulated that petitioner was organized exclusively for religious purposes. . . . The Court adopts this stipulation and finds that petitioner was organized to propagate the faith of Scientology, a religion founded by L. Ron Hubbard"); *Church of Scientology v. Commissioner*, 823 F.2d 1310, 1315 (9th Cir. 1987) ("Neither the [Tax] Commissioner, nor the Tax Court, nor this court questions that the Church of Scientology of California was organized for a bona fide religious purpose."). Nevertheless, the Tax Court upheld the Tax Commissioner's determination of tax deficiencies and late filing penalties against the Church of Scientology of California. The Court held that the Church did not qualify for tax exempt status under §§ 501(a) and 501(c)(3) because it was operated for a substantial commercial purpose, its earnings inured to the benefit of its founder, and it violated well-defined standards of public policy.

On appeal, the Ninth Circuit addressed the Church's expressed concern that the Tax Court had failed to recognize it as a bona fide religion. Under the applicable subsection, the court explained, an organization, in order to be exempt, must show that it is both organized and operated exclusively for religious or charitable purposes. The fact that the entity was *organized* for a religious purpose did not end the inquiry. The court went on to uphold the revocation of tax exempt status claimed by the Church on the basis that the entity did

not *operate* exclusively for religious or charitable purposes since part of its net earnings inured to the benefit of private individuals. *Church of Scientology*, 823 F.2d at 1315.

A conclusion, based upon those two opinions, that courts had determined that the Church of Scientology was "no church" is perhaps, in legal terms, not wholly accurate. However, CSI's assertion that these two opinions definitively refute Daniels' statement and show that courts have determined that CSI is indeed a bona fide "church," is an equally imprecise conclusion. We point out first that the cases do not involve the Church of Scientology International, but rather the Church of Scientology of California (CSC). Second, church status was not involved. The opinions merely decided that, although CSC had been organized for religious purposes, it did not operate exclusively for religious purposes. A reading of the two judicial opinions, then, fairly permits the conclusion that the courts decided that CSC was a church as well as the conclusion that it was not. While both statements are, speaking in absolute precision, arguably incorrect, neither rises to the level of deliberate falsification. Some slight inaccuracy when describing the background of a case does not equate to deliberate misrepresentation or knowing fabrication.

CSI has emphasized, however, that Daniels, who is a lawyer, stated affirmatively that he had knowledge of what "every judge" who had ever looked at the matter had concluded, when in fact he had read only two court opinions dealing with the religiosity of the Church of Scientology. Numerous other opinions, according to CSI, have recognized Scientology as a religion. CSI has asserted that Daniels made a broad statement without exhaustively researching the subject. His failure to inform himself before making the accusation constituted purposeful avoidance of the truth. Purposeful avoidance of the truth, CSI maintains, has been found evidence of a reckless disregard for the truth, and should be so found here. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

Daniels testified that before meeting with the editorial board of USA Today and making his statement, he had read, in addition to the two court cases, numerous articles about Scientology published in magazines and newspapers. The articles he reviewed and supplied for the record — some of which received awards for journalistic excel-

lence — came from a wide variety of reputable publications and comprised an impressive collection of research about Scientology. The articles detailed criminal convictions of a number of the Church's leaders for extortion, forgery, breaking into government offices, bugging the IRS building, and planting Scientology agents in drug-control and intelligence agencies of the government. They reported accusations of mind control by ex-churchmembers and members' families, and chronicled the story of an ex-member who sued the organization — and was awarded $30 million — for mental anguish suffered while a member. They discussed the exorbitant rates charged by the Church to its members in exchange for services, "auditing," and training courses designed to facilitate the spiritual quest. The articles related the transformation of the organization from a "precision science," to a form of psychotherapy, to a religion, a transformation variously described as "expedient," "skillful propaganda," and "a sweeping and sophisticated campaign to gain new influence." Many of the articles quoted court opinions. Virtually all of the articles mentioned the lengthy legal battle that the Church of Scientology of California engaged in when it claimed tax-exempt status, the same battle that resulted in the two court opinions previously discussed. The revocation of tax-exempt status was a recognition on the part of the courts, several of these articles reported, that the Church of Scientology had "made a business out of selling religion." *See, e.g.*, *The Scientology Story: Shoring Up its Religious Profile*, Los Angeles Times, June 25, 1990 (quoting *Church of Scientology*, 83 T.C. 381 (1984)).

The issue before us is not whether the Church of Scientology is a legitimate church or whether its image, beliefs, and behavior conform to a mainstream perception of what a church should be. We need not decide whether the court cases revoking the Church's tax-exempt status deny or confer any judicial sanction upon the organization, nor whether the articles that accuse the Church of nefarious motivations are fair or are merely evidence of "a running dog press" and the "forces of evil," as Scientology's former leader Ron Hubbard once stated. Courts have no authority to determine what is or is not a religion, and no legal formula by which to measure the truth or philosophical acceptability of an entity's spiritual beliefs. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) (the proper judicial task is limited to determining if a claimant's belief's "are sincerely held and whether they are, in his own scheme of things, religious"); *United States v.*

Lee, 455 U.S. 252, 257 (1982) (courts may not evaluate religious truth). Likewise, journalists — even reputable or prizewinning ones — are not the final arbiters of what constitutes a church and do not always write the gospel truth. Thus, we do not quote the court opinions and articles as evidence of the truth or falsity of Daniels' statement. Rather, we review them as support for Daniels' lack of reckless disregard for the truth or falsity of his statement.

What constitutes reckless disregard for the truth or falsity of a statement, the Supreme Court noted in *St. Amant v. Thompson*, 390 U.S. 727 (1968), "cannot be fully encompassed in one infallible definition." *Id.* at 730. However, a public figure plaintiff faces a significant burden in proving actual malice. The Supreme Court has made it clear that a "defendant must have made the false publication with a high degree of awareness of . . . probable falsity." *Harte-Hanks Communications*, 491 U.S. at 667 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731 (1968). In *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991) (*en banc*), we thoroughly discussed the standard of reckless disregard for the truth, and stressed the *Harte-Hanks* requirement that the plaintiff must show that the defendant acted with a high degree of awareness of probable falsity. *Reuber* made it clear that actual malice cannot be established merely by showing a departure from accepted journalistic or professional practices. The case emphasized that the failure to investigate, "where there was no reason to doubt the accuracy of the sources used . . . cannot amount to reckless conduct." *Id.* at 716.

Given the volume of published commentary on the Church of Scientology reporting the findings of various courts that the Church was not eligible for tax exemption, depicting some of the organization's leaders as unscrupulous or criminal, characterizing the entity as a cult or a money making enterprise, portraying its endeavor to style itself as a religion as misleading and opportunistic — in short, describing the organization in terms that are at odds with a common understanding of what a "church" is — it is impossible to conclude

that Daniels entertained serious doubts as to the truth of his statement or spoke with a high degree of probable falsity. His failure to read every court case involving the Church of Scientology does not constitute purposeful avoidance of the truth. *See St. Amant*, 390 U.S. at 733 (1968) (reliance on an unverified affidavit and failure to take steps to investigate did not constitute actual malice where the publisher entertained no serious doubts as to truth of the publication). Moreover, the fact that Daniels couched his statement in terms of what "every judge" had found is not indicative of actual malice. *See Greenbelt Cooperative Publishing Ass'n. v. Bresler*, 398 U.S. 6, 13-14 (1970) (literal inaccuracy in a colloquial or hyperbolic statement is not actionable); *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980) (incorrect interpretation of a report or use of stronger language than the source itself used is not proof of actual malice). Finally, CSI's claim that it produced evidence to show that Daniels bore ill will toward CSI does not help its claim. *See Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2nd Cir. 1977) (ill will or hostility, by itself, does not prove actual malice), *cert. denied sub nom. Hotchner v. Doubleday & Co., Inc.*, 434 U.S. 834 (1977). Accordingly, we hold that CSI has not presented evidence upon which a jury could find, by clear and convincing evidence, that Daniels' statement, if defamatory, was made with actual malice.

III.

CSI makes an additional complaint that the Magistrate Judge erred in denying it the ability to obtain discovery material from USA Today. Although CSI failed to object to the status of discovery as part of its opposition to summary judgment, it filed a motion to compel production by USA Today of all materials relating to the June editorial board meeting, including editors' notes, tapes, and draft articles.

The Magistrate Judge ruled that CSI failed to make the required showing for a need for the privileged materials, a ruling that is reviewable only for abuse of discretion. *See La Rouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986) (in determining whether a journalist's privilege will protect the source, a court must balance whether information is relevant, can be obtained by other means and whether there is a compelling interest in the information; determination is committed to the

discretion of the district court). Nothing in the record shows that there was an abuse of discretion in the denial of discovery of the materials. In fact, the consideration that Daniels offered to stipulate to the accuracy of the quotation that appeared in USA Today makes the relevance of the materials CSI seeks questionable, rather than critical to the case, as the law requires. *See id.* at 1139 (the fact that the plaintiff already knew the names of sources made need for information less than compelling). Although Daniels has stated that he does not recall the exact wording of the statement at the editorial board meeting, the statement being sued upon is that which ran in the paper — not that which was made to the board. Moreover, the Magistrate Judge correctly observed that CSI had made no effort to pursue alternative sources of information concerning the meeting. In short, the Magistrate Judge did not err in refusing to permit additional discovery of privileged material from USA Today.

The judgment is accordingly

AFFIRMED.

Appendix 2

Order of the United States District Court for the Eastern District of Virginia, Alexandria Division (May 29, 1992)

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CHURCH OF SCIENTOLOGY INTERNATIONAL,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 92-160-A
MITCHELL DANIELS,	)	
Defendant.	)	

ORDER

For the reasons stated from the bench, it is hereby

ORDERED that the motion of the defendant for summary judgment is granted, and this action is dismissed.

/s/
United States District Judge

Alexandria, Virginia
May 29th, 1992

Appendix 3

USA Today, June 11, 1991
"Prozac's Critics Hurt Mentally Ill"

USA Today, June 11, 1991
Prozac's critics hurt mentally ill

Prozac, a commonly prescribed antidepression drug made by Eli Lilly and Co., has been under attack from the Church of Scientology and lawyers who have developed the so-called "Prozac defense" – blaming the drug for their clients' behavior. They and some former users charge that the drug causes bizarre mental side effects and can lead to suicide.

***Mitchell Daniels**, Eli Lilly's vice president for corporate affairs, defended the drug and attacked the attackers Monday in a meeting with USA TODAY's editorial board.*

Here are excerpts from that meeting:

Q: **Some people say Prozac is dangerous. Why?**

A: The source of virtually everything you've heard about Prozac has come from the Scientologists, with a boost from trial lawyers whose self-interest is obvious. One thing we want you to understand is that the Church of Scientology is no church. It's a commercial enterprise. Every judge and every investigative journalist who has ever looked at it has come away with that conclusion. It is organized for only one purpose, which is to make money.

Q: But why would they single out Prozac for attack if it's not dangerous?

A: Before Prozac they attacked other pscyotropic medicines. They have attacked psychiatry generally. Any vulnerable patient saved by psychiatry or therapy of any kind is one less potential victim for them.

Q: What evidence says Prozac is safe?

A: It's the most studied drug in the history of brain disease. Two thousand scientific papers. Almost two decades of medical research worldwide. There are 45 or 50 regulatory bodies which have all concluded that it's a safe and effective drug.

Q: Have there been successful lawsuits against Prozac?

A: Zero. And no successful uses of the so-called Prozac defense.

Q: What evidence is there that it works?

A: Clinical trials have proved it is effective in, we believe, two-thirds, 70%, something like that, cases of clinical depression.

Q: How many people have used it?

A: Three to three and a half million. There's a massive database now. And I should add also that everything that has been alleged with regard to Prozac happens in the same frequency or more, much more, in the untreated patient and with the other treatments. It is simply a part of the disease and not the drug.

Q: What's wrong with raising questions about it?

A: The issue here is the restigmatization of mental health and the alarm and the scaring of patients away from seeking treatment.

Q: Has the criticism affected sales?

A: Prozac is still the best-selling antidepressant and sales are up some, but the market share is off appreciably, as the world knows.